YAP CHENG KIM v. ZAHID SAFIAN BIN TAWAF

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.JJ.) June 12 & October 8, 1979]

[Kota Bharu — Federal Court Civil Appeal No. 112 of 1978]

Contract — Assignment of forest permit — Whether illegal — Assignee alleging that he was compelled to repudiate contract — Onus of proof.

In this case the respondent and Yayasan Trengganu held a forest permit over part of a forest reserve. By an agreement with the Yayasan Trengganu the respondent undertook to fell, extract and haul timber in the area. The forest permit and the agreement with Yayasan Trengganu contained similar conditions, that is, assignment, transfer or subletting was subject to written approval of the State Forest Officer and of the Yayasan. The appellant agreed to accept assignment from the respondent subject to those conditions. The appellant advanced monies to the respondent in payment of royalty and also incurred other expenses. He brought an action to recover the sums paid alleging that the respondent had conducted himself in such a way as to compel the appellant to repudiate the contract of assignment. The learned trial judge dismissed the claim and the appellant appealed.

Held: (1) in the circumstances of this case as approval could have been obtained from the State Forest Officer, the contract of assignment would have been legal;

(2) the onus was on the appellant to prove what was the conduct of the respondent and what were the conditions of the agreement which entitled her to withdraw from the agreement and to recover payment. The appellant had failed to discharge the onus and therefore the appeal must be dismissed.

Case referred to:-

(1) *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.* [1977] 2 M.L.J. 200.

FEDERAL COURT.

C. Jegathesan for the appellant.

Wan Adib bin Haji Wan Ali for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): The only question to be determined in this appeal is whether the appellant who had agreed to accept assignment from the respondent, a holder of a forest permit, and had made payment towards premium under the permit is entitled to a refund of the payment when the appellant subsequently repudiated the agreement to accept assignment said to be by the conduct of the respondent.

This appeal is against the dismissal by the High Court at Kota Bharu of the appellant's action against the respondent claiming damages. Briefly the action was as follows: The respondent with Yayasan Trengganu held a forest permit over a compartment of forest reserve in the Mukim of Ulu Paka, District of Dungun in Trengganu. By an agreement made with the Yayasan (the Yayasan Agreement) on 18th day of April, 1973, the respondent undertook to fell, extract and haul timber in the compartment. The forest permit and the Yayasan Agreement contained similar conditions, i.e. assignment, transfer or subletting was subject to prior written approval of the State Forest Officer (SFO), in the case of permit, and the Yayasan, in the case of the Yayasan Agreement. Subject to these conditions, the appellant agreed to accept assignment from the respondent. On August 1, 1973 the appellant advanced monies to the respondent for the benefit and use of both sides in payment of royalty and other incidentals to the SFO $6,007.75 and cash $350. Since the payment, the respondent conducted himself in such a way as to compel the appellant to repudiate the contract of assignment. The appellant also incurred other expenses amounting to $6,920.

The respondent in his defence merely admitted the forest permit and the Yayasan Agreement but denied other allegations. However, he stated in the alternative that the alleged agreement of assignment was *ex facie* illegal from its inception to the knowledge of the parties as it was a deceit on the administration.

At the trial it was agreed that evidence should rest on the pleadings and on the agreed bundle of documents. Damage was agreed upon at $10,000, in the event of the respondent being held liable.

Paragraph 1 of the forest permit appearing in the agreed bundle, and as rendered from its Malay text, is to the effect that the permit holder shall not transfer whatever right, duty and responsibility under the permit to any person by power of attorney or other means except with the written approval (not *prior* written approval as stated in the statement of claim) of the SFO.

The relevant clause of the Yayasan Agreement reads:

"'The Second Party' (the respondent) shall not transfer, sub-let or assign all or any of the benefits to be derived by the Second Party under this Agreement to any third party without first obtaining the approval in writing of the First Party." (Yayasan).

Apart from the forest permit and the Yayasan Agreement, the agreed bundle contains other documents. There is an agreement entered into between the respondent and 2 persons from Seremban. It relates to the terms of financing the respondent, who is described as the borrower, by the 2 persons in the exploitation of the forest area. This agreement does not appear to have any bearing to the present case. Then, there is a letter from the respondent to the forester in charge of a Forest Checking Station in Kemaman requesting that removal of the logs from the compartment be stopped, and stating that he was dissatisfied with the work and conduct of the contractor, because the respondent had not been supplied with a copy of the agreement, he did not know whether or not the remaining premium of $6,000 had been paid, and, on inspection of the compartment, he discovered that all the workers were Chinese when his agreement with the Yayasan required that 75% of them should be Malays. This letter was dated July 30, 1973. The agreed bundle also contains a letter also dated July 30, 1973 from the SFO to the respondent informing him that the balance of the premium, $6,000, had still not been paid. Followed by this is a bank draft for $6,000 dated August 1, 1973 drawn by the appellant in favour of Pengarah Perhutanan Negeri (the present title of SFO), Kuala Trengganu or Order. The bundle further shows a letter dated August 13, 1973 from the respondent's solicitors to the appellant's solicitors offering the appellant the right to extract the timber under the permit on the terms:

(a) the contract price was to be $134,616.25. $94,121 to be paid to the respondent within 7 days of the letter and the balance of $40,495.25 within one month of the first payment;

(b) the respondent was to receive 40% of nett profit of all timber extracted from the said compartment.

The appellant's solicitors by letter of August 14, 1973 rejected the offer and asked for the return of $6,000 plus $350.

The learned trial judge's reasons for dismissing the claim briefly are to this effect: By reason of the condition in the forest permit he was of the view that if the assignment had been conditional on the consent of the SFO being obtained, the assignment would have been legal. He found that the assignment had not been truly conditional, but complete under the camouflage of being conditional, by reason of the appellant having made payment of the further premium of $6,000 on August 1, 1973 which must have been after the contract. If there had been a true conditional contract, the appellant should not have made the payment, as there was nothing to show that the respondent had requested her to make the payment. Since the contract was not conditional but complete (and before approval), it was void and the loss must lie where it fell.

For the appellant, it is argued that the trial court should have at least made the order refunding the money paid by the appellant for the premium, as at the time of payment there was no written agreement but only an oral contract, the parties were aware of the conditions of assignment in the forest permit and the Yayasan Agreement, and there had been no concealment. It is further argued that the present case is different from the authorities discussed, which mainly deal with assignment without prior written approval, and by the permit, approval by the SFO need not necessarily be before assignment.

The respondent's side argues that both sides knew that prior approval was required before there could be an assignment of the forest permit and the Yayasan Agreement, and as payment was made before approval, the oral contract was a camouflage for an illegal assignment, and a claim for refund could not be enforced.

Both sides discussed several authorities but for the present purpose it is suffice to refer to the latest authority, *Sundang Timber Co. Sdn. Bhd.* v. *Kinabatangan Development Co. Sdn. Bhd.*[1] This case dealt, *inter alia,* with an agreement assigning forest licence rights which fell under the Forest Rules, which contain a specific provision to the effect that the licensee shall not assign the benefits of the licence or part with any right or privilege without the previous sanction in writing of the Government. The Federal Court upheld the decision of the High Court that an agreement without previous sanction was illegal and any claim based thereon could not be enforced.

In the circumstances of the present case, we propose to deal with the appeal on the assumption that the contract of assignment would have been legal. The Yayasan agreement on the face of it merely prohibits transfer or assignment of the benefits (which should be distinguished from obligations) to be derived by the Yayasan without prior written approval. It does not seem to affect the respondent's interest as co-holder of the permit. Nor does it appear to affect an obligation, as the present case is all about. The Yayasan, like the respondent, is merely a permit holder and the rights of both as to assignment are governed by the permit. Under the forest permit the obligation to pay the premium is on both the Yayasan and the respondent. On the overall consideration, it may be accepted that the respondent has the same rights as the Yayasan in dealing with the forest permit. There are also strong grounds, which will be shown below, for accepting the contention of the appellant that approval by the SFO of an assignment of the forest permit need not necessarily be given before an assignment.

We agree with the finding of the learned trial judge that there must have been some agreement towards assignment between the appellant and the respondent before the payment by the appellant of the further premium, having regard to the ordinary course of business transaction, and to the fact that it was made on August 1, 1973, in the wake of the respondent's complaint to the Forester at Kemaman about the contractor and the remaining premium of $6,000 etc. We also agree with the finding that the appellant must have made payment on her own, but in the sense that she was asserting a right. Whether or not there had been a request by the respondent is of no significance, in view of the finding that there had been agreement before the payment. The bank draft also points to this. It shows that she was the drawer and that it was in favour of Pengarah Perhutanan Negeri, Kuala Trengganu (SFO). The payment in her own name can only be construed that she was assuming the position of an assignee or claiming a right under an agreement towards an assignment. The fact that the Forest Department, apparently without question, accepted from her the payment of the further premium under the forest permit would go to show, in the absence of evidence to the contrary, that the SFO would have approved of the assignment, as the obligation to make payment under the permit is not on the appellant but on the respondent and the Yayasan.

From the above, it is established that the payment of the premium was towards a proper agreement to accept assignment. There remains to be determined whether the appellant is entitled to recover the payment. *Sundang's* case, above, decided that any claim based on a contract which was illegal for being in breach of law could not succeed as it was tainted with illegality. But it does not necessarily follow that a claim based on a legal agreement can succeed without showing the circumstances justifying restitution or recovery.

In the case here, the appellant expressly pleaded that it was by the conduct of the respondent she was compelled to repudiate the conditional contract. The respondent denied this plea. The onus was therefore on the appellant to prove what was the conduct of the respondent and what were the conditions of the agreement which entitled her to withdraw from the agreement and to recover payment. The fact that the agreement was oral does not lessen the onus. The trial court only had the evidence of the appellant's rejection of the respondent's offer in his solicitors' letter of August 13, 1973. But no evidence was led to show that the offer was so unreasonable as to attract repudiation. On the scanty evidence, the trial court could

not have been in a position to determine the conduct of the respondent or the conditions of the oral agreement which, in law or equity, would warrant recovery by the appellant of the payment that had been made.

In the circumstances we see no ground for disturbing the decision of the trial court in dismissing the claim.

The appeal is dismissed with costs. Deposit to respondent towards taxed costs.

Appeal dismissed.

Solicitors: *Jegathesan & Co.; Wan Adib & Co.*

CENTRAL SECURITIES (HOLDINGS) BHD. v. HARON BIN MOHAMED ZAID

[F.C. (Raja Azlan Shah Ag. L.P., Chang Min Tat & Ibrahim Manan F.JJ.) September 26 & November 1, 1979]
[Kuala Lumpur — Federal Court Civil Appeal No. 105 of 1978]

Practice and Procedure — Appeal to the Yang di-Pertuan Agong — Interlocutory judgment or order — Whether judgment under Order 14 a final order — Certificate that judge requires no further argument — Appeal from High Court — Whether judgment or order fit one for appeal — R.S.C., 1957 O. 54, rr. 22, 22A & 23 — Courts of Judicature Act, 1964, ss. 68(2), 74.

The respondent applied for leave to appeal to the Yang di-Pertuan Agong from two orders made by the Federal Court — see [1979] 2 M.L.J. 244. The first order was a dismissal of the respondent's application to abort the appeal of the third party (appellant) from the High Court on a contention that the appeal being one from an interlocutory judgment or order was without the leave of a judge of the High Court in Chambers as required by section 68(2) of the Courts of Judicature Act, 1964 and therefore not properly before the Federal Court. The second was an order setting aside the order giving the respondent leave to sign final judgment against the appellant on a summons for directions brought by the respondent against the third party (appellant).

In the High Court the learned judge had dismissed the application to set aside the third party notice and given leave to the respondent to sign final judgment against the third party (appellant) on his summons. The learned judge subsequently indicated under rule 22A of Order 54 of the Rules of the Supreme Court that he did not require further argument. In the circumstances even if the matter was interlocutory no leave was required for the appeal and the Federal Court dismissed the respondent's application to stop the appeal. The Federal Court also gave unconditional leave to defend. The respondent applied for leave to appeal to the Yang di-Pertuan Agong as it was argued that the case was a fit one for appeal.

Held: (1) the Federal Court was bound to follow its previous decisions which have held that an order giving leave to sign final judgment is a final and not an interlocutory order;

(2) in this case if the order refusing to strike out the third party notice and the Order 14 judgment are interlocutory then the certificate of not requiring further argument obtained on the solicitor's application rendered the appeal to the Federal Court competent. If the Order 14 judgment was final then no leave was required and the appeal was of right. There was therefore no real difference in the appeal procedure requiring the Federal Court to make a reference to the Privy Council for final determination whether an Order 14 judgment was final or interlocutory;

(3) in the circumstances of this case, the case was not a fit one for appeal and therefore the applications must be dismissed.

Cases referred to:-

(1) *Lopez* v. *Velliappa Chettiar* [1968] 1 M.L.J. 224 P.C.
(2) *Re Croasdell & Cammell Laird & Co.* [1906] 2 K.B. 569.
(3) *Nagappa Rengasamy Pillai* v. *Lim Lee Chong* [1968] 2 M.L.J. 91 F.C.
(4) *T.O. Thomas* v. *K.C.I. Reddy & Anor.* [1974] 2 M.L.J. 87 F.C.
(5) *Salaman* v. *Warner* [1891] 1 Q.B. 734.
(6) *Standard Discount Co.* v. *La Grange* (1877) 3 C.P.D. 67.
(7) *Egerton* v. *Shirley* [1945] K.B. 107, 110.
(8) *Bozson* v. *Altrincham Urban District Council* [1903] 1 K.B. 547.
(9) *Tampion* v. *Anderson* (1974) 48 A.L.J.R. 11, 12.
(10) *Salter Rex & Co.* v. *Ghosh* [1971] 2 Q.B. 597, 601.
(11) *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad (No. 2)* [1970] 1 M.L.J. 253 F.C.
(12) *Hong Kim Sui* v. *Malayan Banking Berhad* [1971] 1 M.L.J. 289 F.C.
(13) *Becker* v. *Marion City Corporation* [1976] 2 W.L.R. 728 P.C.
(14) *In re Page, Hill* v. *Fladgate* [1910] 1 Ch. 489.
(15) *Price* v. *Phillips* (1894) 11 T.L.R. 86.
(16) *Hunt* v. *Allied Bakeries Ltd.* [1956] 1 W.L.R. 1326.
(17) *Technistudy Ltd.* v. *Kelland* [1976] 1 W.L.R. 1042; [1970] 3 All E.R. 632.
(18) *Ratnam* v. *Cumarasamy & Anor.* [1962] M.L.J. 330.
(19) *Young* v. *British Aeroplane Co. Ltd.* [1944] K.B. 718 C.A.
(20) *Huddersfield Police Authority* v. *Watson* [1947] 1 K.B. 842.
(21) *Davis* v. *Johnson* [1978] 2 W.L.R. 553; [1978] 1 All E.R. 1132.

FEDERAL COURT.

V.C. George (*K.S. Narayanan* with him) for the applicant.

M. Sivalingam (*Nik Mohamed Din bin Nik Yusoff* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The defendant Haron bin Mohd. Zaid (Haron) applies for the leave of this court to appeal to His Majesty the Yang di-Pertuan Agong from two orders made by this court, the first an order made on February 27, 1979 and the second an order made on May 16, 1979.

Appeals to the Yang di-Pertuan Agong are governed by the provisions of section 74 of the Courts of Judicature Act, 1964. An appeal lies with the leave of the Federal Court,

"74(1)(a) from any final judgment or order in any civil matter where

(i) the matter in dispute in the appeal amounts to or is of the value of twenty-five thousand dollars or upwards;
(ii) the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right of like amount or value; or
(iii) the case is from its nature a fit one for appeal; and

(b) from any interlocutory judgment or order which the Federal Court considers a fit one for appeal."

Section 75(1) sets a time limit of six weeks for an application for leave from the date on which the decision appealed against was made. Time may however be extended by the Federal Court. Section 75(2) spells out the powers of the Federal Court to set conditions regarding the execution of the order sought to be appealed from or for a stay.

Though the leave of the Federal Court is required in all cases, *Lopez* v. *Velliappa Chettiar*[1] has laid